

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ANDREW B. KIMBROUGH,
Plaintiff,

v.

DOUGLAS WADDINGTON,
Superintendent; *et al.*,

Defendants.

Case No. C08-5602RJB

ORDER GRANTING
PLAINTIFF'S MOTION
TO REOPEN TIME TO
APPEAL

This matter comes before the court on the September 14, 2010 order of the Ninth Circuit U.S. Court of Appeals. Dkt. 56. The court has considered the order of the Ninth Circuit, defendant's response to plaintiff's motion to reopen the case, and the file herein.

On May 17, 2010, the court adopted the Report and Recommendation of the Magistrate Judge, and dismissed this case under Rule 41(b)(2) of the Local Rules for the United States District Court for the Western District of Washington. Dkt. 44. Judgment was entered on May 18, 2010. Dkt. 18.

On August 12, 2010, plaintiff filed a Notice of Appeal. Dkt. 49. On September 7, 2010, plaintiff filed a request that he be permitted to reopen this case without pursuing the appeal. Dkt. 53.

On September 14, 2010, the Ninth Circuit entered an order, noting that the Notice of Appeal stated that plaintiff did not receive the district court's final order until August 2, 2010. Dkt. 56. The Ninth Circuit construed that statement as a timely motion to reopen the time to appeal pursuant to Fed.R.App.P.

1 4(a)(6), and remanded the case to the district court for the limited purpose of allowing the district court to
2 rule on plaintiff's motion to reopen the time to appeal. Dkt. 56.

3 On September 14, 2010, defendants filed a response opposing plaintiff's motion to reopen the
4 case, contending that plaintiff failed to provide the court with his current address, and that the court
5 properly dismissed the case for failure to comply with Local Rule 41(b)(2). Dkt. 57.

6 Fed.R.App.P. 4(a)(6) provides in relevant part as follows:

7 **(6) Reopening the Time to File an Appeal.** The district court may reopen the time to file an
8 appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the
following conditions are satisfied:

9 (A) the court finds that the moving party did not receive notice under Federal Rule of Civil
10 Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days
after entry;

11 (B) the motion is filed within 180 days after the judgment or order is entered or within 14
12 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of
the entry, whichever is earlier; and

13 (C) the court finds that no party would be prejudiced.

14 In this case, plaintiff did not file an appeal within thirty days of the date of the court's order
15 dismissing the case. See Fed.R.App.P. 4(a)(1). It appears that plaintiff was notified by the librarian at the
16 Washington Correction Center on or about July 28, 2010, that case had been dismissed. Dkt. 49, at 2.
17 Plaintiff apparently did not receive the court's May 17, 2010 order dismissing the case within 21 days
18 after entry. The motion to reopen time to appeal (as stated in the Notice of Appeal) was filed August 12,
19 2010, within 180 days after entry of the judgment or order. Finally, defendants will not be significantly
20 prejudiced by being required to respond to the merits of the appeal. The court should grant plaintiff's
21 motion to reopen the time to appeal.

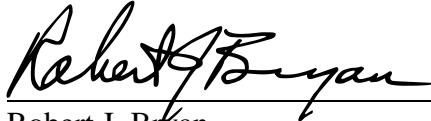
22 Defendants' response to plaintiff's motion to reopen addressed the merits of the appeal. Those
23 issues may be further pursued in connection with the appeal.

24 Therefore, it is hereby

25 **ORDERED** that plaintiff's motion to reopen the time to appeal is **GRANTED**. The appeal filed
26 on August 12, 2010 is considered to be a timely appeal.

1 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any
2 party appearing *pro se* at said party's last known address.

3 DATED this 15th day of September, 2010.

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5 Robert J. Bryan
6 United States District Judge
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